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ABSTRACT

The paper examines legal issues involved in the assaultive behavior of emotionally disturbed students. A special education due process decision is cited to illustrate the definition of assault and the need for seeking alternatives to expulsion. Related legal issues (discipline and punishment, liability for injuries resulting from assaultive behavior of students, and assault and corporal punishment) are reviewed. The case study cited involves a disturbed student who allegedly assaulted the assistant principal. Testimony of witnesses is summarized and the decision in favor of the student is presented. Reactions by teachers, professors, and administrators conclude the document. (CL)

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# BEHAVIORALLY IMPAIRED

A Support System for Services for Behaviorally Impaired

## Legal Considerations Concerning the Assaultive Behavior of Behaviorally Impaired Students

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# Legal Considerations Concerning the Assaultive Behavior of Behaviorally Impaired Students

by

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Wood, F. Developing Guidelines for the Use of Non-traditional Educational Interventions. Chapter 4, 1982.

Zabel, M. K., Identification & Programming for Behaviorally Impaired Preschool Children: Current Procedures & Programs. Chapter 5, 1982.

Vasa, S. Resource Consultant Model for Delivery of Service to Behaviorally Impaired Students in Rural Areas. Chapter 6, 1982.

Zabel, R. H., and Peterson, R. L., Providing Education for Behaviorally Impaired Student's in Rural Areas. Chapter 7, 1982.

Rosell, J. Residential Treatment of Behavior Disordered Children Chapter 8, 1982.

Balow, B., Raison, S., Raison, J., Policy Options for Serving Autistic-like Children. Chapter 9, 1982.

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May, 1982
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# The Legal Considerations Concerning The Assaultive Behavior of Behaviorally Impaired Students

C. Stuart Robertshaw, Ed.D., J.D.

Today it is well recognized that behaviorally impaired or emotionally disturbed children have a legal right to be educated in the public school systems of this country. Such a right has been articulated through a long line of court cases which had its beginning in 1954. The legal basis for the claim that emotionally disturbed children have as much right to be educated at public expense as those non-emotionally disturbed peers began with the legal principles established in the United States Supreme Court decision in Brown v. Board of Education 347 U.S. 413 (1954). The United States Supreme Court, in its unanimous opinion stated:

"Education is required in the performance of our most basic public responsibilities. It is the very foundation of good citizenship. It is the principle instrument for awakening the child to cultural values, in preparing him for later training in helping him to adjust normally to his environment. It is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. The opportunity of an education when a state has undertaken to provide it is a right which must be made available to all on equal terms."

Historically such an equal education was denied children who were determined to be emotionally disturbed. In fact, background information provided to the United States Congress in support of legislation which mandated special education for handicapped children (P.L. 94-142) indicated that apparently 50 percent of the eight million handicapped children were not receiving an appropriate education and approximately one million handicapped children received no education at all. As recent as 1980, it has been conservatively estimated over 700,000 children with serious behavior disorders are not receiving special education (Grosenick and Huntze). As Weintrub and Abesbon (1974) remind us:

Public policy largely determines how society will perceive a class or group of individuals. Thus the nation's policies regarding handicapped children by and large have cumulatively produced the negative image of these children. Society's negative view of the handicapped is developed when such children are excluded from the schools of all other children, confined to distant out of sight human warehouses and refused access to airplanes, driver's licenses and employment strictly on the basis of their handicap.

Turnbull and Turnbull (1978) indicated that the major legal development in the current decade has been the extension of the principle of egalitarianism to handicapped persons. The egalitarian principles, as it applies to emotionally disturbed children, states "that all persons, however unequal they may be in terms of their abilities, should be treated equally by being granted equal opportunities."

Clearly, the laws of this country have been responsive to the call for equality in the educational treatment of emotionally disturbed children. At the same time, it is recognized that emotionally disturbed children bring to the demand, specially trained staff, specially designed instruments and individual program planning. Further, as Aichorn (1964) stated in referring to the disturbed adolescent, such a youngster often,

...is not in the psychological state we would like to have him. "He is negativistic, often hostile, insecure, irritable; he feels superior and pretends a still greater superiority; often he is not interested in what we can offer him and very rarely does he expect that the hours with us will serve a useful purpose."

Such children may very well display behavior which can only be characterized as aggressive and assaultive which create unique dilemmas for the public school system.

A Case History

In order to fully understate the legal issues included in assaultive behavior of emotionally disturbed children, the author has provided a recent opinion he wrote as a hearing officer in a special education due process hearing. The case included an allegation of assault by an emotionally disturbed student and the resultant expulsion by a local school board. The names of the persons and places have been changed and extraneous information has been deleted.

Ms. Steven Brown,
on behalf of Sean Brown,
Petitioner

vs.

The Unified School District,
Respondent

Decision in
Special Education Appeal
Pursuant to State and Federal
Statutes

Summary of Dispute

Sean Brown, son of the petitioner, was expelled from the Unified Junior High School at the completion of a hearing before the Unified School Board. The school board was presented documentation of a series of incidents that included: (a) absenteeism; (b) truancy; (c) use of obscene or abusive language; (d) not being prepared for class with the proper utensils; (e) talking during study hall; (f) refusal to do

academic work; (g) leaving dirty dishes and a tray on the table in the lunchroom; and most recently, (h) a physical assault on Mr. Richardson, the Assistant Junior High Principal. The school board voted unanimously to expel Sean from the Junior-Senior High School and directed Mr. White (the District Superintendent) to develop an alternative education program for him. It was clear from the motion and the transcript of the hearing that the school board recognized it's continuing obligation to Sean Brown as a special education student and did not interpret the term "expel" as an abdication of their responsibility toward providing an education program to Sean Brown.

At the school board hearing Mr. Smith, legal counsel for Sean Brown, requested that the "Question of suspension or expulsion of Sean Brown be heard by a hearing officer from the list of hearing officers designated by the state which hearing right is afforded by Public Law 94-142 and by state statutes."

Witnesses

The following persons testified at the hearing on behalf of the school district:

1. Mr. Thomas Richardson, Assistant Junior High Principal;
2. Mr. John Green, Principal of the Junior High School;
3. Mr. Peter Black, Physical Education teacher;
4. Mr. Patrick Tellar, Junior High teacher;
5. Mr. Donald Pink, Industrial Arts teacher;
6. Ms. Betty Red, President of the Unified School Board;
7. Mr. George White, District Superintendent of the Unified School Board District.

The following persons testified at the hearing on behalf of the child:

1. Sean Brown, an exceptional education student;
2. Mr. Steven Brown, father of Sean Brown;
3. Ms. Patricia Gray, Special Education Director;
4. Ms. Karen Tan, Teacher of the Learning Disabled;
5. Mr. David Orange, Teacher of the Emotionally Disturbed;
6. Mr. Michael Blue, School Psychologist.

Summary of Relevant Testimony

Mr. Richardson testified regarding the alleged assault incident which occurred on March 10. Mr. Richardson testified that at approximately 11:14 a.m. on March 10, when the junior high students were returning to the building from being outside during the lunch hour, Sean Brown walked by him and "flipped me in the breast." Mr. Richardson stated as Sean continued to walk by him he grabbed him by the upper arm and pushed him over to the wall and that Sean became angry, swore and swung at Mr. Richardson once and hit Mr. Richardson and knocked his glasses off and Mr. Richardson attempted to restrain him. Then, Sean picked up Mr. Richardson's glasses and returned them to him, swore, and walked off when Mr. Richardson was attempting to talk

him into coming into his office. Mr. Richardson also testified that 100 to 150 students observed the incident. Further, Mr. Richardson testified that he yelled to the other kids to go in and get a teacher, stating, "I need help." Mr. Richardson testified that at first he pushed Sean to the side and later in attempting to restrain him he moved him toward the wall.

Mr. Richardson testified that he was present at the M-team meeting on March 18 which was convened to determine if the alleged assault was: (a) related to Sean's emotional disturbance; (b) if Sean's program placement was correct; and (c) if program placement was correct, to determine if any modification of program was necessary. He further testified that the M-team found that the incident was related to Sean's emotionality, but was not the cause of the alleged assault. He agreed with that finding. He felt that Sean's emotionality was not the cause of the incident because at the M-team meeting, Mr. Green (Principal) and Mr. Pink (Industrial Arts Teacher) indicated that they had grabbed Sean before in the past and Sean had not reacted the way he did on March 10.

Mr. Richardson testified that Mr. Green instructed Mr. Richardson to make arrangements to have all of Sean's teachers at the M-team, as the first notice of the M-team meeting included only those in special education. Mr. Richardson testified that he therefore invited Mr. Donald Pink, Mr. Peter Black, and Mr. Patrick Yellow.

Mr. Richardson further testified that he interpreted Sean's 'flipping' behavior as an assault and he therefore pushed him away. He further testified that at the time of the incident he knew that Sean was a special education student. He stated that although he did not remember it at the time of the incident, he had been informed by Mrs. Brown (Sean's mother) one month prior to the alleged assault, that Sean was very sensitive to being touched. Mr. Richardson testified that Sean had not displayed violent behavior prior to the March 10 incident. Further, he testified that he believed that Mr. Green stated at the M-team meeting that Sean was dangerous and violent based upon the March 10 incident.

Mr. Richardson testified that the majority of his prior contact with Sean involved disciplinary matters and that Sean was an honest and strong-willed boy. He further testified that 100 to 150 children observed the alleged assault and that he had the responsibility to maintain order or there would be a "madhouse." He stated that he felt expulsion was appropriate and that the expulsion proceeding was not designed to cut Sean off from education or to deny Sean the privilege of attending the Junior High program.

Mr. John Green, the Unified Junior High principal, testified that he decided to move for an expulsion hearing because of Sean's repeated acts of defiance and assault. He further testified that in the past he had an opportunity to grab Sean by the

elbow and that Sean responded verbally "take your hands off me" but did not engage in physically aggressive behavior. Further, the principal testified that he agreed with the M-team's determination that there was a relationship between Sean's handicapping condition and the assault, but that it was not a causal relationship. He indicated that Sean knows right from wrong and that it would be inappropriate to allow him to continue his education at the Junior High School. Mr. Green stated on cross examination that he decided to move for an expulsion hearing prior to the M-team meeting.

In addition, he stated that he felt all the student's teachers should attend the M-team and not just the special education staff, and that is why he instructed Mr. Richardson to be sure that all of Sean's teachers were present at the March 18 M-team meeting. Further, Mr. Green stated that he agreed with Mr. Richardson's statement that Sean is an honest and truthful boy. The witness stated that the M-team findings of a relationship between the handicapping condition and the alleged assault had very little meaning to him as he felt "Sean's action was not caused by his disability." Mr. Green stated that he did not feel Sean was violent prior to March 10 but he felt he was violent following that incident when Mr. Richardson was "assaulted." He indicated at the M-team that he stated, "This was the first time that Sean assaulted anyone."

Mr. Green read into the record the definition of assault in the Junior High School Student-Parent Handbook which states:

> ..."assault" is doing an act with intent to cause fear in another or immediate bodily harm or death or intentionally inflicting or attempting to inflict bodily harm upon another."

Mr. Green stated that he felt the "Act of assault occurred at the time that Mr. Richardson attempted to restrain Sean and Sean began flailing or hitting or resisting his attempts to restrain him or subdue him" Mr. Green felt that the school must take action to prevent assault from occurring as other students who are injured as a result of such assaultive behavior could sue the school district for damages.

Mr. Peter Black, Sean's Physical Education teacher, testified that he agreed with the M-team that Sean's alleged assault was related to his handicap, but not the cause of the incident. Mr. Black further stated that when Sean was allowed back in school following the suspension, the other kids cheered Sean and said "way to go." Mr. Black stated that he felt that the staff needs to set the rules and make an example of this situation. He further stated that he had had very little behavior problems with Sean in his physical education classes.

Mr. Patrick Yellow, a junior high teacher, testified that he did not feel that Sean's handicapping condition was the cause of the assault. He further

stated, "No matter whether he was emotionally disturbed or not, if he was guilty of assault then he should be expelled." Mr. Yellow further testified that he felt Mr. Richardson used good judgement in not striking or using force with Sean Brown.

Mr. Donald Pink, Sean's Industrial Arts teacher, stated that he agreed there was a relationship between Sean's handicap and the assault, but that the assault was not caused by his handicap. He further testified that he had grabbed Sean in the past and took him aside to talk to him and that he did not react aggressively.

Ms. Betty Red, President of the Board of Education of the Unified School District, testified as to the decision of the School Board to expel Sean Brown. She stated that the Board did not expel him from the school district but requested Mr. George White, the Superintendent, to develop education alternatives and to have a psychiatric evaluation of Sean completed. She stated that the School Board didn't feel that the condition of emotional disturbance would prevent the boy from learning from his experience and he should learn from the experience. She stated that the School Board felt it was in his best interest that he be excluded from the Junior High School building so he could learn the natural consequences of his action. She testified that the board first wanted a psychiatric evaluation, then would explore options for providing special education. She testified that the options discussed included: (a) placement in an elementary school with an eighth grade level; (b) homebound instruction; and (c) another school district and they would provide the transportation. She further stated that a psychiatric evaluation was completed and that she had not seen the report.

Mr. George White, the District Superintendent of the Unified School District, testified that after the school board directed him to explore educational alternatives for Sean Brown he: (a) contacted Social Services regarding foster placement; (b) talked with Mrs. Gray, Director of Special Education, and she arranged a psychiatric evaluation in a private psychiatric clinic for Sean the next week; and (c) contacted Jamestown School District and Storytown School District to determine if they had an E.D. program and whether they would consider taking Sean as a tuition student. He indicated that he was contacted by an attorney from State Department of Public Instruction, and told to place Sean back in his school program and do nothing further. He further stated, Sean "did something wrong and we're not going to tolerate it but we have an obligation to give him the best opportunity to get education that we can," and that is why he was exploring educational options. Further, the psychiatric report was received by Mr. White and copies were sealed and not available to the staff.

Sean Brown testified regarding the March 10 incident that: (a) there was a fight pre-

viously that was "broken up;" (b) as he was coming into the school building he squeezed Mr. Richardson on the left shoulder and said, "Hey Mr. Richardson baby;" (c) he went past him; (d) Mr. Richardson grabbed him and threw him up against the wall; and (e) that he lost his temper, started swinging, and he didn't mean to hurt Mr. Richardson. Sean stated that he got mad, "After he hit his head up against the wall." He stated that he tried to "give him the claw" which he explained meant to place his hand in Mr. Richardson's face in order to push him away. He testified that as he walked away he told Mr. Richardson, "to keep your f--- hands off me" and left school for the day. He stated that he had Mr. Richardson's glasses in his left hand all the time the incident was going on.

He returned the next morning to school and the principal gave him a piece of paper to write out his version of what happened the previous day. He then spent the day in the Readjustment Room and was suspended until March 19. He stated that he had nothing against Mr. Richardson and that his initial contact during the March 10 incident with Mr. Richardson was intended as a friendly gesture. He further indicated that he thought it was strange Mr. Richardson reacted the way he did (grabbing him and pushing him up against the wall) because he didn't think he did anything wrong.

Mr. Steven Brown, Sean's father, testified that on March 10 Sean arrived home at supper time and told his father that, "He got into it with his teacher and took off from school." Further he stated that there was a bump on his head which he thought was a result of the school incident. Mr. Brown indicated that he did not feel Sean was a violent or aggressive child but that he did swear quite often. Mr. Brown further testified that as far as he is concerned, the school has the authority to contact Sean's social worker if Sean is truant or having school difficulties.

Ms. Patricia Gray, Director of Special Education for the Unified School District, testified that Sean had his first M-team two years prior. At that time, it was recommended that he be placed in a program for emotionally disturbed children, and be provided learning disability resource services. Further, she testified that she was informed on March 11 at 8:30 a.m., at a meeting with Mr. White, Mr. Richardson, and Mr. Green, that the school was going to move toward an expulsion hearing. She testified that at that meeting, Mr. Richardson stated that he did not remember Sean stating, "Mr. Richardson baby," but that Sean did pinch him in the breast, that he grabbed Sean and pushed him up against the wall and that Sean began flailing and "lost control." Regarding the March 18 M-team composition, Ms. Gray testified that in reviewing the State Department of Public Instruction Guidelines, she felt the M-team should be composed of members with certification in special education and not all of Sean's teachers. Further, she

testified that Mr. Green, in the past, has not put additional staff on the M-team yet specifically requested that notice be sent notifying the regular classroom teachers who had Sean to be at the M-team meeting. Ms. Gray testified that she felt written comment from Sean's regular classroom teachers would have been sufficient.

She testified that the March 18 M-team was not to review the expulsion hearing but to determine the relationship between child's handicap and the incident that occurred and whether the child's handicap was the cause of a child's propensity to disrupt. She stated that the M-team found a relationship between the handicapping condition but also found that the handicapping condition was not the cause of the incident. She further elaborated that the M-team determined that the cause of the incident was Sean's "flicking of the breast" and that her interpretation of cause by the M-team was the physical touching by Mr. Richardson of Sean which caused him to flail and strike Mr. Richardson. She testified that as a result of the incident, Sean has been suspended for a total of 20 days.

Ms. Gray further testified that the special education staff has used the private psychiatric clinic for a prior Special Education case. She indicated that in her prior dealing with the private clinic she was pleased with the quality and comprehensiveness of the evaluation and that she had not talked directly with the psychiatric staff regarding Sean and had not read the psychiatric report as of the date of the due process hearing. She further stated that she personally felt that disciplinary action was warranted in this case as a result of the alleged assault but not expulsion.

Ms. Karen Tan, Sean's learning disabilities teacher, testified that she felt there was a relationship between Sean's emotional disability but that she didn't feel it was the cause of the incident that occurred on March 10. She testified that she filed a separate report to be included in the M-team report of March 18. Her report concludes: "If Sean is confronted too close to his personal space he is capable of losing self control. He acts without thinking. It has been in these situations that Sean has received referrals from me. It is my opinion that if Sean were cornered he may lose his self control, and I would attribute this to his inability to control his emotional responses." She further testified that she felt that the 20 days of suspension that had resulted from the incident was sufficient discipline and that she feels he needs more in the way of counseling.

On cross examination, she stated that striking an administrator is an act which would warrant expulsion from the school building in some cases but that in Sean's case, because he has an emotional disability, it would not be warranted. Ms. Tan testified that based upon her observation of Sean's behavior in the past which included such things as: false kicking of

peers and putting his arm around the head of another child in play, that she would characterize the "flicking" reported by Mr. Richardson as typical of Sean's playfulness. She further stated that most recently since his reinstatement in school (as a result of the directive from the State Department of Public Instruction attorney) he has been well behaved in class.

Mr. David Orange, Teacher of the Emotionally Disturbed, testified that: (a) he wrote the report of the M-team meeting on March 18; (b) that he felt many of Sean's behavior problems such as inappropriate social skills and poor rationalization skills "triggered" the event of alleged assault; and (c) the physical outbursts of Sean were not observed prior to the incident but he felt it was predictable if the child was cornered. He further stated that he did not feel expulsion was an appropriate disciplinary consequence for Sean, especially in light of the fact the I.E.P. identified concern for teaching appropriate socialization skills and long range concern involved preventing Sean from dropping out of school.

He testified that he had not observed an incident similar to the "flicking" described by Mr. Richardson. Mr.Orange stated that Sean has been improving in his quality of academic work and total work completed and that profanity had not been a problem in his class. He further testified, that Mr. Green, the Junior High Principal; and Mr. Richardson, the Assistant Junior High Principal, have been "super" in their support of his classroom and working on some of the more difficult disciplinary concerns.

Mr.Orange indicated that in his opinion the alleged incident was related to Sean's emotional disability, although he agreed that his emotional disability was not the direct cause of the specific incident. He stated that his interpretation of direct cause was referring to Sean being physically touched by Mr. Richardson. He further testified that the prior example of touching or grabbing (incidents involving Mr. Green and Mr. Pink) occurred in uniquely different situations. Mr. Orange's statement attached to the March 18 M-team meeting concluded: "While Sean's actions, regardless of his intentions, cannot be condoned, I remain steadfast to my conviction that Sean's inappropriate social skills triggered the incident of March 10, and current placement services should be maintained." Further, he testified that the M-team on March 18 had considered more restrictive placements and less mainstreaming but rejected both, because there was a consensus that the program was reasonably successful as it was currently being implemented.

Mr. Michael Blue, the School Psychologist, testified that in his report which accompanied the March 18 M-team report, he wrote that, "In evaluating the incident between Mr. Richardson and Sean Brown, it is my professional opinion that Sean's behavior was entirely consistent with the emotional disability and the circumstances of that situation. That is, the circumstances of the

situation allowed Sean to react in a manner which would be predictable based upon his disability. It is without question that Sean has some difficulty with spontaneous judgement of social feedback from both adults and peers, and this has been previously documented."

He further testified that he interpreted Sean's initial contact with Mr. Richardson as a friendly gesture offered by Sean and it was met by a nonfriendly gesture by Mr. Richardson and Sean's resultant defensiveness was consistent with his disability. He stated that the M-team was confused in attempting to determine the "causal relationship between disability and the incident" and that he would define cause as a disability when the person was recognized as being overtly aggressive and having a tendency to react that way in unprovoked spontaneous situations. Further, the M-team agreed that, Sean had not in the past, displayed other physically aggressive acts and to the contrary, Sean tended to withdraw from stress rather than engage in aggressive behaviors.

In addition, he testified that although it was Sean's preferred manner to withdraw from stressful situations, in the March 10 incident, he virtually had no option to withdraw as he was immediately grabbed by Mr. Richardson. Mr. Blue further stated that in his opinion Sean was not dangerous or violent. He noted that he had an opportunity to read the psychiatric report from Northern Psychiatric Associates prior to the hearing, and that he generally agreed with the conclusions of the psychiatric report; namely, "His behavior and the aggressive incident with the adult, by our impressions, grew out of his special emotional needs and problems, and was compounded by a failure of the environment to respond in a constructive and helpful fashion, we feel that the decision made to expel this youngster from school for the duration of the year was not appropriate, and potentially harmful for this young man. We would further hope that this decision would be reversed at the earliest possible time, and that consideration would be given, in light of our diagnostic work with this young man, to reverse this decision." Mr. Blue stated that he felt Sean should be disciplined for his actions but that expulsion was too severe. Further, he testified that the psychiatric evaluation was undertaken primarily because Mr. Richardson questioned the expertise of the Special Education staff to adequately determine a cause and effect relationship between Sean's handicap and the March 10 incident. Mr. Blue testified that at the time of the M-team he did not determine whether Sean struck Mr. Richardson before or after Sean was bumped against the wall. Further, he stated that it is was his opinion that, "The friendly gesture by Sean was met by the physical grabbing and moving off to the side and at that point Sean would have a difficult time fleeing from the situation or analyzing what kinds of social things are going on and he would react defensively." He stated

that whether the flailing occurred before or after Sean's head was bumped he did not view it as an important factor in forming his opinion.

Findings of Fact and Conclusions of Law

An analysis of the testimony and exhibits presented at the hearing lead to the following findings of fact and conclusions of law:

1. The incident that occurred between Sean Brown and Mr. Thomas Richardson on March 10, was not an assault. The hearing officer finds that Sean did not engage in the midconduct with the "intent to cause fear in another or immediate bodily harm or death or intentionally inflicting and attempting to inflict bodily harm upon another" (Unified School District: Junior High School Student-Parent Handbook, definition of assault). The totality of the testimony indicated that: (a) Sean Brown's initial contact with Mr. Richardson was intended as a friendly gesture; (b) the initial contact was perceived by Mr. Richardson as an aggressive and inappropriate act and Mr. Richardson responded consistently with his perception of the incident. It clearly may have been a socially inappropriate act but it nevertheless was not intended to inflict harm upon Mr. Richardson. Further, Mr. Richardson's view of and reaction to the initial contact may have been justified based upon the actual thrust or force of the contact; (c) as a result of Mr. Richardson's grabbing Sean and pushing him (either aside or up against the wall), the hearing officer finds that Sean reacted in what he viewed as a defensive posture which is consistent with the psychological assessment of Sean. The hearing officer finds that the striking of Mr. Richardson was not intended to injure Mr. Richardson but occurred as a result of Sean Brown attempting to free himself from Mr. Richardson's grip.

The preceding findings are supported by testimony involving the incident itself which indicated that: the initial contact was paired with a friendly statement, "Hey Mr. Richardson, baby;" immediately following the initial contact, Sean continued walking on past Mr. Richardson; upon freeing himself from Mr. Richardson's grip, Sean ceased any aggressive behavior; immediately returned Mr. Richardson's glasses, and withdrew from the situation. Additional testimony at the hearing indicated that Sean had not, in the past, displayed overt physical aggressiveness or violent behavior and that the episode of March 10 was an isolated event.

2. The State Association of School Board's publication was relied upon at the March 18 M-team meeting as a definitive statement of the M-team review process regarding the relationship between the child's handicap and the misconduct. The following selected portions of that document are relevant to the findings of the hearing officer:

(a) Assessment of the School Board's Publication stated, in summarizing the Florida Federal District Court decision in S-1, et al. vs. Turlington: "The court opened that a school board does not have the necessary expertise to make such determinations. Rather, only the trained and specialized team of individuals provided for under P.L. 94-142 may evaluate a child's placement needs and make a determination of whether the student's handicap bears a causal relation to his or her misconduct."

(b) The article stated, in summarizing the Indiana Federal District Court decision in Doe vs. Koger: "Expulsion may not be pursued until after it has been determined that the handicapped child has been properly placed, and the professional evaluation team determines that the student's disruptive conduct is unrelated to his or her handicaps (emphasis added).

(c) The article recommended: "If the student has already been referred, identified and placed as a student with exceptional educational needs, the school district must convene an M-team or determine if the student's conduct is related to his or her condition. If the two are not related, the expulsion may proceed as previously discussed. If the child's condition and behavior are related, the M-team must proceed to develop a more appropriate educational placement for the child, with expulsion being the last resort (emphasis added).

Throughout the conduct of the hearing it became clear that there was a great deal of confusion as to: (a) who should review the relevant factors regarding the relationship between the child's handicaps and the child's misconduct, and (b) what is the standard for that review.

Using the Association of School Board's article as a guideline, it is clear that "the trained and specialized teams of individuals" in this case should have included: the teacher of the emotionally disturbed; the teacher of the learning disabled, the school psychologist, the director of special education; and any other professional person who has the training and expertise that they determine necessary (i.e., a psychiatrist, clinical psychologist, etc.).

The review should include a complete assessment of the relationship between the child's handicap and the child's misconduct. In the instant case, there was agreement and documentation that Sean's misconduct was related to his handicapping condition but not caused by his handicap. The March 18 M-team members (which included those with special knowledge and expertise and others) apparently focused on such a limited definition of cause that the only case where cause would be found in a similar fact situation would be a child who responded by aggressive behavior each time he was touched or grabbed. In the Fifth Circuit Court of Appeals decision in S-1, et al. vs. Turlington (January 26, 1981), the appellate court stated: "It follows that an ex-

pulsion must be accompanied by a determination as to whether the handicapped student's misconduct bears a relationship to his handicap... A determination that a handicapped student knew the difference between right and wrong is not tantamount to a determination that his misconduct was or was not a manifestation of his handicap... Unlike any other disruptive child, before a disruptive child can be expelled, it must be determined whether the handicap is the cause of the child's propensity to disrupt."

The hearing officer finds that: There was a relationship between Sean Brown's handicap and the misconduct that occurred on March 10, the misconduct was a manifestation of his handicap; and that his handicap was the cause of the child's propensity toward misconduct. The testing and exhibits of those with special knowledge and expertise clearly indicate that Sean Brown's major difficulties include: inappropriate social skills; difficulty judging social feedback from adults and peers; and inability to control his emotional responses when confronted or cornered.

3. Further, in S-1 et al. vs. Turlington, the Federal appellate court determined that the school district has the burden to establish that a handicapped student's misconduct in an expulsion hearing is not a manifestation of the student's handicap. The hearing officer finds that the school district failed to meet that burden. Further, the testing and exhibits presented at the March 19 School Board hearing and at the April 23 Special Education hearing, by those who possess the training and expertise to make that determination, were unanimous in their agreement that there was a sufficient relationship between Sean Brown's handicap and the March 10 misconduct to warrant denial of an expulsion proceeding. In addition, the other misconduct documented in the record is clearly not sufficient to justify an expulsion proceeding of a handicapped child with Sean Brown's documented emotional difficulties.

The hearing officer is aware of the fact that the March 10 incident was viewed by a large group of junior high school students and apparently has received considerable press coverage in the school district. This opinion is in no way to be construed as condoning the inappropriate misconduct of Sean Brown and his own reaction to the events of March 10. The hearing officer feels that the resultant 20 days of suspension from school are sufficient disciplinary consequences for the inappropriate behavior.

BASED UPON THE PRECEDING FINDINGS OF FACT AND CONCLUSIONS OF LAW, IT IS ORDERED THAT:

1. Sean Brown be fully reinstated to Unified School District Junior High School.

2. That all records pertaining to the March 19 School Board hearing and decision be expunged from Sean Brown's educational records.

The preceding case is pre-

sented as illustrative of a situation which occurred involving assaultive behavior by an emotionally disturbed child and the application of a traditional remedy available to the school, namely expulsion. Due to the long history of the use of exclusionary techniques applied to emotionally disturbed children, the Federal law has been interpreted to include expulsion as a change of placement and therefore subject to a due process review by a special education hearing officer. The case is particularly interesting because it resulted in a classic confrontation between legal principles and values inherent in the current special education laws and traditional legal principles and remedies for student misconduct. There is little doubt that the special education legislation anticipated that some emotionally disturbed students would, in fact, be aggressive and assaultive. However, the principles of equal educational opportunity would become meaningless to such children unless the school had the burden to demonstrate its' good faith effort to provide appropriate education for such children. Further, it is recognized that some children will continue to exhibit assaultive and dangerous behavior and not respond positively to appropriate educational programs designed to modify such behaviors. Under the law, the school may consider an appropriate alternative educational placement for such children after documentation of a good faith effort to educate such children. Good faith effort to educate the assaultive child would differ factorally on a case by case basis, but universally it involves proof that the school has employed competent and professionally trained staff and provided the resources to implement an appropriate program.

## Brief Review of Related Legal Issues

Discipline and Punishment. A school teacher may exercise such powers of control, restraint and correction as may be reasonably necessary to enable him/her properly to perform his/her duties and to accomplish the purposes of education. It has been held that school personnel have limited authority over the individual conduct of pupil wholly outside the schoolroom and school grounds (unless involving a legitimate school activity), when they are presumed to be under the control of their parents.

A teacher has the power to punish a pupil for all acts considered to be detrimental to the good order and best interests of the school, and for the breaking of any rules and regulations which it is within the power of the school authorities to adopt. However a student cannot properly be punished for a breach of a regulation which is unreasonable, or with which it is beyond his power to comply.

The use of detention or the keeping in of pupils for a short time after a class has been utilized as a penalty for misconduct, and has been generally legally recognized as a method of enforcing discipline. If such a

discipline technique is exercised in good faith, and without wanton, willful or malicious motives, it typically is not actionable under law for redress by the courts.

The general enjoyment of the right of attending the public schools is necessarily conditioned on compliance of students with the reasonable rules, regulations and requirements of the school authorities. Assaultive behavior, either directed toward another child or to school authorities or any other person, is a breach of the rules and regulations of the school and most often is dealt with by supervision or expulsion.

Principals and teachers have a legal duty to maintain discipline and good order and to require of all pupils a faithful performance of their duties. In order that school personnel can discharge their duties effectively, they must necessarily have the power to enforce prompt obedience of their lawful commands. When school personnel are disciplining emotionally disturbed children they must consider whether the assaultive behavior is related to the child's handicap and examine other educational alternatives, short of exclusion, to appropriately educate the child.

Liability for Injuries Resulting From Assaultive Behavior of Students.

Common law legal doctrine generally stresses the fact that the school is not an insurer of the safety of students, but the school clearly has a legal duty to exercise ordinary care and to act as a reasonable person would act under similar circumstances. Court cases have stressed that supervising school personnel were required to act to prevent an injury where the specific injury was reasonably foreseeable, or in a particular situation in which the general potential for danger was apparent. For example, in Silverman vs. Board of Education, 225 N45sd 77 (1962), the court imposed liability upon school personnel when there was evidence warranting a finding that the injury was reasonably foreseeable and could have been prevented by adequate supervision. A child was injured as a result of an assault by a gang of pupils who had a history of assaultive and "troublesome" behavior.

School personnel may be liable for personal injuries to a student which resulted from the assaultive behavior or misconduct of a fellow student. The courts will extend liability if there is sufficient evidence to conclude that there was a failure on the part of school personnel to exercise proper supervision, or when a student is permitted to engage in conduct which might foreseeably result in injury to a fellow student. The major determining factor in most of such cases appears to be whether school authorities could reasonably have foreseen the danger in a particular situation. The courts have generally held that negligence is not present on the part of school authorities where the occurrence of an injury could not reasonably have been foreseen.

It should be noted that there

is a wide divergence of opinion among courts regarding what school authorities are expected to reasonably foresee. For example, some courts have held that misconduct is reasonably to be expected whenever a group of students is assembled, while other courts take the positive that in the absence of proof of prior misconduct, misconduct is not required to be anticipated. In the case of classroom injuries inflicted by a student who has known assaultive propensities, there is authority to the effect that the school may be liable for injuries caused by such students if the school personnel do nothing reasonably calculated to protect fellow students from such assaulative students (see Ferraro vs. Board of Education, 212 NYS 2d 615, and 221 NYS 2d 279, (1961). In contrast, there was no liability found, even though an injury occurred where a reasonable attempt is made to prevent such injury (see Bertola vs. Board of Education, 150 NYS 2d 831 (1965). In Bertola, a student was injured when he was suddenly and without warning struck by a fellow student. There was no prior notice of assaultive tendencies by the aggressive student. Liability was denied without regard to whether supervisory personnel were present, on the grounds that the legal cause of the injury was the assault and not the absence of supervision. When an altercation breaks out in the presence of supervisory personnel, failure by a teacher to intervene has been held negligent on the grounds that it is reasonable to anticipate that such altercation might result in injury to one of the participants.

The fact that a teacher is not present in the classroom is not negligence as a matter of law. The teacher has the duty to use reasonable care, which has been held to depend upon a variety of factors such as: (a) the age and composition of the class; (b) the activity the students are engaged in; (c) the teacher's past experiences with the class and its propensities; and (d) the reason and duration of the teacher's absence. For example, liability for a student injured by objects thrown in the classroom by other students was denied even though the injury occurred when the teacher was temporarily absent and engaged in other duties. The facts established that the circumstances were such that the injury could not have been anticipated by the teacher (see Ohman vs. Board of Education, 300 N.Y. 306 (1949).

A school board was found liable as a result of the negligence of a school principal in an interesting case. A high school student was attacked by a fellow student who was well known by the principal and fellow students as an aggressive student. The incident occurred while the student had lined up in preparation for a change of class period and in the presence of a substitute teacher. The substitute teacher had been teaching this class for two days and had never been informed of the history of misconduct by the aggressive student. The court found the principal negligent in his failure to alert the substitute teacher and thereby

depriving her of the opportunity of exercising her own judgement regarding preventative supervisory steps she could have taken to prevent the incident (Ferraro, cited earlier).

Assault and Corporal Punishment.

It is a well settled principle of law that even where a teacher has the right to use force for the accomplishment of a legitimate purpose, he may be liable in damages for assault where the force used by him is excessive under the circumstances. This is particularly true when assault is charged on the ground of excessive unreasonable or unwarranted corporal punishment inflicted on a child by a parent or a teacher. For example, various factors are considered by courts in determining whether corporal punishment administered by a teacher to a student was within the protection of legitimate privilege or actionable as assault. Among such factors are: The nature of the punishment itself; whether it caused permanent injury; the victim of the offense for which the punishment was inflicted; the physical condition of the student; and the teacher's motive in administering discipline. Further, teachers would be well advised that some corporal punishment is regulated in some jurisdictions by state statutes or school board regulations.

Since it is well settled law that the use of reasonable corporal punishment by a teacher as a disciplinary measure is "privileged", where it is sought to hold a teacher liable for damages, the crucial question that arised is the reasonableness of the punishment. A person who is in charge of the education and training of a child is a public officer is privileged to inflict such reasonable punishments as are necessary for the child's proper education or training. That privilege is to apply such force or impose such confinement upon one or more pupils as is reasonably necessary to secure observance of the discipline necessary for the education and training of the child.

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## A Series of Reactions

A Reaction by:

Sharon, Navas
Teacher of Behaviorally Impaired
Lincoln Public Schools
Lincoln, Nebraska

While reading Robertshaw's paper I was constantly mulling over similar situations I had experienced when expelling or disciplining students.

Many public schools have a "due process" policy for discipline which outlines the steps leading to expulsion and the student's rights. But rarely do these policies make exceptions for verified handicapped students, and such disciplinary decisions are usually made by the teacher involved, an administrator, and perhaps a counselor. I have never seen a multidisciplinary team (M-team) meet for such a purpose, nor is it a procedure to document whether or not the offense was related to the handicap.

Special educators, though, as their title implies, often make numerous curriculum and physical adjustments for handicapped students as the result of acting out behaviors. Many of these incidents may be anecdotally documented but never come to the attention of an M-team nor are they entered into a "due process" file. In this way, special educators often determine on their own whether a student's misconduct is related to his handicap and become hearing officer, M-team, and judge simultaneously.

This topic is particularly timely because I recently registered for a staff development class called "Progressive Phyical Intervention." The organizers were amazed at the response and had to schedule three additional classes. My personal reason for attending was to review and become more skillfull in ways of restraining violent outbursts to prevent further injuries to anyone involved--including myself. So I was interested in Robertshaw's statement that school districts may be liable for injuries to a student which resulted from the assaultive behavior of a fellow student. (p. 25) I also began to wonder if any legal and ethical considerations will be discussed at these classes.

Obviously Robertshaw's observations are very pertinent to Special Education today--- especially to behaviorally impaired programs. He noted that the fact that a teacher is not present in the classroom is not negligence as a matter of law, but if the students in the class were emo-

tionally disturbed, I imagine the opinion would be much different. (p. 26) Also, is an aide's presence alone a case against negligence?

I think most districts in Nebraska who have BI programs would simply avoid the expulsion procedure and find another placement equipped to handle assaultive behavior. Many districts do not have adequate Special Education programs and so do not label students who might be BI. This avoids any legal and ethical considerations which might come to bear in expulsion procedures. This may also be why there have been no cases concerning verified BI students and school districts to set precedence in Nebraska. At this point it seems to be the professional decision of special educators and administrators. Robertshaw's summary of recent court decisions was helpful in that it presented facts about circumstances under which teachers and school districts might be liable. It also gave me some guidelines to use in similar situations.

A Reaction by:

Cara Perkins
Resource Teacher
Lincoln Public Schools
Lincoln, Nebraska

The paper is helpful in terms of citing court cases, decisions and laws related to definitions and circumstances involving behaviorally impaired (emotionally disturbed) students. This information is helpful to teachers, and the explanation of the egalitarian principle was good.

I also liked the emphasis of the fact that BI/ED students are unique and require specialized programs. The issue of assaultive behavior is an important one, especially at this time of unrest in our schools. As far as I know, in Nebraska each school system basically has its own criteria and procedures for dealing with such behaviors. However, severe ED students are difficult to help in a public school setting and staff and facilities are often inadequate.

A Reaction by:

Jackie Robertson
Principal of Whitehall School
Nebr. Center for Children and Youth
Lincoln, Nebraska

The phrase "unique dilemma" used in the article by C. Stuart Robertshaw is very appropriate. Unique means different or unusual and dilemma means a situation of confusion--unusual confusion. This describes the situation caused by widely differing opinions regarding treatment of special needs people. In my life time, the accepted mores of society have changed from total removal, to close integration -

i.e.,: an institution outside the town, to group homes in neighborhoods. Now there are individuals whose philosophical stance is at either extreme with the majority in between.

In the legal case described in Robertshaw's article, the school district, personified by the principal, was at the end of the continuum which was in vogue 30 years ago. In addition, the individual's lack of self-esteem and/or training in how to cope with special needs youth, was not well developed.

"Hindsight", of course, is always easier, but one can fantasize the whole scene being used as a teaching opportunity. The "flick," given by Sean, if received by a different individual, could have been interpreted as a form of friendly communication and a similar response given--- i.e.: a pat, a handshake (if one didn't realize touching bothered Sean) or a quieting verbal response, i.e.: "glad to see you today, Sean." This could have been followed later with a private conversation about more appropriate ways of greeting if a good relationship had been built. If not, a request could have been given to the teacher or person with whom Sean felt comfortable to teach this lesson of getting along with others. Ms. Betty Red, Board of Education, spoke wisely: "The condition of emotional disturbance would not prevent the boy from learning from the experience and he should. All people must receive opportunities to learn -- the egalitarian principle states "that all persons, however unequal they may be in terms of their abilities, should be treated equally by being granted equal opportunities." Another style of coping with the same situation would have been used by a more mature, stable, trained person--someone with a value system of deepness--a human being who lives a life of FAITH, not fear. It is a joy to contemplate a more worthy use of time, energy and money with positive constructive goals and OUTCOMES!!

Although the focus of this paper is on the legal and ethical considerations in dealing with ED/BD students, the incident discussed may encourage each of us to examine our ability to cope with, have tolerance of, and react to deviant behavior.

The case study described is relevant because the circumstances and results would be very similar in most communities. The majority of teachers, administrators and parents do not have sufficient knowledge or understanding of themselves or others to respond in mature and responsible ways to persons of special needs. It was interesting to note that everyone involved considered the situation to be of serious nature and all agreed that consequences should follow. Of course, this was after the situation had become an ISSUE. The article is thought provoking and led me to consider thoughtfully the relationship between one's personal value system and the reaction to potential crisis situations.

The issues addressed are important in my opinion. Each person has the right to determine

their own tolerance level and to establish their own value system. A book entitled "The Joy of Being Human" describes feelings of persons in a beautiful style. The author accepts the fact that most people have insecurities and often respond in defensive manners. The idea of "losing face" is a fear human beings develop. Due to this, power struggles often ensue and arguments--even wars--can result. Many times I have observed highly intelligent and fine persons give up their own self-control to something of limited importance. For example, a student "manipulated" a teacher for at least thirty minutes one day (while I was observing from the hall) over how to replace a pencil in the holder. It seems to me that for that time the pencil became ALL IMPORTANT the god, if you will. Both persons eventually lost--time and energies of both were wasted. This simple situation multiplied is similar to the case of Sean Brown vs. the Unified School District. One can only imagine the waste of time, energy and money.

As stated earlier, "unique dilemma" is indeed a correct descriptive phrase for the situations in which persons feel or are threatened by others. Often interactions, as those in the Robertshaw article, tend to be in conflict between perceived roles. Some youth and adults feel that to be accepted, a sense of bravado must be expressed. Whenever there is a win/lose situation, both parties ultimately lose. The article by Robertshaw intensifies my belief that one's personal values are the most important component for a secure, meaningful, and fulfilling life style. Education staff personnel have a great opportunity to teach by word and example!

A Reaction by:

Winifred Uhlinger
Teacher of Behaviorally Impaired
Lincoln Public Schools
Lincoln, Nebraska

The paper "The Legal and Ethical Considerations Concerning the Assaultive Behavior of Emotionally Disturbed/Behaviorally Impaired Students" certainly points out that all children (including those who are emotionally disturbed) do have the right to receive a public education. PL 94-142 was passed so these students who had been denied public education in the past would have the opportunity to be educated.

The paper describes one case in detail. It is very thorough and provides the reader with insight into process and procedure as well as ethics. The issues presented are pertinent and important. It is pointed out that if a legal suit goes to court, the school has a good chance of losing.

My feeling is that Nebraska schools have few support services available for the emotionally disturbed (ED) student other than

the special education (ED) teacher who is responsible for the student's program. Also, because of past court decisions, principals are reluctant to label students as ED because procedures developed for use in "due process" with rational students are not applicable when ED (irrational) students are involved. Nebraska schools are expected to handle programs for the behaviorally impaired (BI) without having a medical model.

It seems fair to assume (from the cases presented in Robertshaw's paper) that schools are losing suits because ED/BI programs are not being handled in an adequate way. Nebraska is no exception.

The legal aspects and problems described in the case history of Brown vs the Unified School District typify what is happening to ED/BI programs. Fewer and fewer students are being designated as BI. Secondary special education programs are being run very much like the regular school program with less and less being done for the truly atypical student. When special education teachers, the school psychologist, regular classroom teachers and administrators appear for opposing parties (as in the Brown case noted above) it is symptomatic of inadequate handling of BI programs. Termination of those supporting the BI student would probably result if a similar situation developed in Nebraska.

There is a definite need for more people in authority to address the "real" problem associated with the education of ED/BI students. Some examples of things that need to be done are presented below:

1. Policy must be developed and a climate of trust established so atypical students are identified as early as possible.
2. It must be insured that adequate medical examinations and psychiatric evaluations are performed so students with physical disabilities and those who are emotionally disturbed can be placed in programs appropriate to their respective needs.
3. It must be insured that adequate, meaningful documentation of physical disabilities and/or behavioral patterns is generated and that this documentation is made available to receiving schools when students are enrolled or transferred into their Special Education programs.
4. It must be insured that "the trained and specialized team of individuals provided for under PL 94-142 to evaluate a child's placement needs....." be identified at the BI program level. The team should include the ED/BI teacher, a psychiatrist, a Social Services Agency representative, a parent(s) and, perhaps, the school psychologist.
5. It must be insured that the "team" in 4. above is designated as the appropriate body to review the relevant factors regarding a student's handicap and/or misconduct and to establish standards for that review.

A Reaction by:

Stan Wilke
Teacher of Behaviorally Impaired
So. Sioux City Public Schools
So. Sioux City, Nebraska

Initially my reaction to Brown vs. Unified, the case example in Robertshaw's paper, was that I wished that all of the exact information had been included. I found it difficult to orient myself to the situation. I also had difficulty with the scheme of colors substituted for actual names. What was the reason for all the anonymity?

As the facts of the hearing unfolded, an old familiar story of typical responses to behaviorally impaired students appeared: 1) We have little or no empathy with behaviorally impaired students; 2) we believe them to be a threat to established patterns of behavior; 3) we overreact to them; 4) we expect the worst from them and see to it that they live up to our expectations; 5) we are looking for excuses instead of solutions; 6) we would rather get rid of them than work with them.

Sean's situation in the case is very typical. A boy identified as having serious behavior problems caused a problem, and gets a reaction from the Principal. This was probably his goal. These kind of students are not pleasant to be around most of the time. Their lives are disordered. They are not at ease. They are angry and generally they bring out the worst in the people they are around. They do not use good judgement. In dealing with them we have to remember that we are the responsible ones, they are the clients. If we overreact to their actions, we can only expect them to maintain their behavior or get worse.

I am aware personally of most of the conditions in this type of situation. We have had similar conditions before in our own school with behaviorally impaired students involved in rule infractions, fighting, smoking, and truancy. I have argued against suspensions and expulsions. It is a very lonesome position. It is also dangerous. If the Principal says, "out he goes", you become unpopular very quickly if you attempt any other position. They may not get you now but there is always that little technicality down the road when you may become vulnerable.

A Reaction by:

Lee Witters, Ph.D.
Professor of Special Education
University of Nebraska-Lincoln
Lincoln, Nebraska

The paper "The Legal and Ethical Considerations Concerning the Assaultive Behaviors of Emotionally Disturbed/Behaviorally Impaired Students" is one that definitely makes a contribution to the literature of the field of Behaviorally Impaired. That a paper dealing with this topic

should be prepared is without question. A comprehensive review and interpretation of court decisions affecting student behavior in schools is desirable for the state of Nebraska and all other states.

The case study approach is a legitimate and appropriate method to handle this difficult topic, and may be the only way to deal with it. The case described in the paper is comprehensive, in great detail, and quite typical. I well remember 25 years ago, as a junior high school counselor, being involved in an incident where one young man assaulted another with a knife. The incident caused a roar in the community, but schools at that time had far greater legal protection than today. The rights of students, parents and teachers; due process; discipline, and similar issues were not major educational problems from a legal and ethical view. For sure, there were no support services for the emotionally disturbed students. Litigation and legislation of the past 10 years have changed the school climate, to say the least.

My own sense of the paper, however, is that the case study is emphasized at the expense of legal and ethical principles and procedures. I expected Professor Robertshaw to present an extensive review of the legal and ethical interpretations of court decisions concerning assaultive behavior. Perhaps ethical principles to guide us in the schools with issues like corporal punishment and due process. We need to go to the heart of what we expect of our schools, what rights we provide and what objectives we demand of students in general and ED students in particular.

It seems to me the major contribution of this paper is to set the background for a comprehensive summary of legal and ethical principles from litigation and legislation dealing with the issues of student behavior. What would be extremely valuable to all teachers of the state, not just ED/BI teachers, is a concise, historical review of court decisions on discipline and due process in the school, followed with a summary of the basic legal and ethical principles to guide us. These decisions are of critical importance to teachers, administrators, parents, and students.